Supreme Court, U.S.
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No. 93-995

In The

Supreme Court of the United States

October Term, 1993

HOME BUYERS WARRANTY CORPORATION II, and NATIONAL HOME INSURANCE COMPANY,

Petitioners,

vs.

JULIETTE G. LOPEZ,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari review is necessary where the dispositive issue is the Alabama Supreme Court's factual determination that a warranty contract containing an arbitration provision does not sufficiently "involve" interstate commerce to invoke the provisions of the Federal Arbitration Act?

2. Whether certiorari review is necessary for Petitioners' claim that Alabama Supreme Court decisions concerning the Federal Arbitration Act conflict with decisions by this Court?

3. Whether certiorari review is necessary for Petitioners' claim that Alabama Supreme Court decisions concerning the Federal Arbitration Act conflict with the decisions of some United States courts of appeal?

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9 U.S.C. § 1 6

STATEMENT OF THE CASE

Juliette Lopez filed this action, asserting claims based on a warranty contract involving Home Buyers Warranty Corporation, II ("HBW"), and National Home Insurance Company ("NHIC"). HBW and NHIC filed a motion to compel arbitration, and the circuit court of Montgomery County, Alabama granted that motion. Ms. Lopez appealed the order to the Alabama Supreme Court.

On August 20, 1993, the Alabama Supreme Court granted a writ of mandamus compelling the circuit court to vacate its order. Petitioners argued to both the circuit court and the Alabama Supreme Court as if the contract containing the arbitration provision — and the associated facts concerning interstate commerce — was the contract for the purchase of the house. Significantly, the Alabama Supreme Court noted that the arbitration provision involved in this case was contained in the warranty contract involving the Petitioners, *not* in the contract to purchase the house. Based on that distinction, which Petitioners fail to acknowledge even to this Court, the Alabama Supreme Court held that factually there was insufficient evidence that the arbitration provisions of the warranty contract involved interstate commerce to invoke the Federal Arbitration Act ("FAA").

HBW and NHIC filed their certiorari petition. They argue as if their true objection is to the standard used by the Alabama Supreme Court to determine if a contract involves interstate commerce so as to invoke the FAA. Ms. Lopez will show that this Court need not review that standard, and that Petitioners are actually seeking review of the factual findings of the Alabama Supreme Court. Certiorari need not be granted to review those factual determinations.

SUMMARY OF THE ARGUMENT

There is nothing unusual or spectacular about this case despite Petitioners' frantic tone. The Alabama Supreme Court made a factual determination supportable under any standard that the warranty contract containing the arbitration provision did not involve interstate commerce. Petitioners effectively concede that the test itself they challenge can be used to broaden the applicability of the FAA by a court making a factual determination that the FAA applies. Rhetoric notwithstanding, it is the factual determination in this case that Petitioners actually challenge.

There is no conflict between the decisions of the Alabama Supreme Court and decisions of this Court or the United States courts of appeal. Petitioners do not state fully Alabama's law on the challenged test. Viewed in full context, Petitioners' cases are distinguishable. For all these reasons, certiorari review of this case is unnecessary.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI REVIEW IS UNNECESSARY, BECAUSE PETITIONERS' SELF-CONTRADICTORY POSITION ON THE MERITS OF THE TEST USED BY THE ALABAMA SUPREME COURT SHOWS THAT IT IS THE FACTUAL APPLICATION OF THE TEST WITH WHICH THE PETITIONERS ACTUALLY DISAGREE.

A. Petitioners Contradict Themselves On The Substantive Effect Of The Test They Challenge.

Petitioners continuously complain about the "contemplation" test used by the Alabama Supreme Court, saying that it functions to *restrict* the applicability of the FAA. (*See, e.g.*, page 12, Certiorari

Petition.) They contradict themselves, however, in the process of trying to distinguish the cases from which the Alabama Supreme Court took the test:

> [The opinion in which Petitioners contend the contemplation test originated] addressed the "involving commerce" question, *not for the purpose of restricting the reach of the FAA* . . . but [to address] whether the agreement on its face "evidences interstate traffic." 287 F.2d, at 387.
>
> North Carolina's Supreme Court, which sometimes relies on [the] "contemplation" language, does so not to further an anti-arbitration policy, *but to broaden the reach of the FAA and rebut arguments that it does not apply* . . . .

(Emphasis added). Pages 12-13, HBW and NHIC's Petition for a Writ of Certiorari.

Petitioners acknowledge that the *contemplation test itself* is not necessarily restrictive of the applicability of the FAA.[1] To the contrary, according to Petitioners, the contemplation test was written "not for the purpose of restricting the reach of the FAA," and the test can be used as a matter of fact "to broaden the reach of the FAA." By acknowledging that the *contemplation test itself* is usable to broaden the FAA, Petitioners acknowledge that *the test itself is not deficient.* The deficiency, if there is any, must be in the *application* of the test to the facts of a case. Petitioners cannot

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1. Petitioners do not show *any differences whatsoever* in the Alabama formulation of the test than in the cases where they acknowledge the test as not restrictive of the FAA and usable to broaden it.

admit that, however, without having to convince this Court their petition deserves review because of the factual determination by the Alabama Supreme Court.

B. The Application Of The Substantial Contemplation Test To The Facts Of The Case Is The Source Of The Petitioners' True Disagreement Raised In This Petition For A Writ Of Certiorari.

The Constitution of Alabama provides broad jurisdiction to the Alabama Supreme Court. With no intermediate appellate review, the Alabama Supreme Court reviews a circuit court ruling concerning a motion to arbitrate by a petition for writ of mandamus to that circuit court. *Ex Parte Alexander*, 558 So. 2d 364, 365 (Ala. 1990). As opposed to certiorari review, the Alabama Supreme Court reviews, as a matter of an appellant's right, mandamus petitions filed on motions to arbitrate. Accordingly, the Alabama Supreme Court often serves to correct factual errors in rulings by the circuit court.

The Alabama Supreme Court found "no evidence" that the contract involved interstate commerce. *Lopez v. Home Buyer's Warranty Corp. et al.*, 628 So. 2d 361, 364 (Ala. 1993). As a practical matter, that finding is what the Petitioner seeks to have this Court reverse. Certiorari review is unnecessary for that purpose.

There is nothing spectacular or unusual about this case. The warranty contract, not the contract for the house purchase, contained the arbitration provision. The only evidence indicating that the warranty contract involved interstate commerce was that it provided that any claims under the warranty should be filed in either Denver, Colorado, or Tucker, Georgia. Petitioner's other factual arguments about whether the contract "involved" commerce address the *contract for the purchase of the house.*

Please imagine Ms. Lopez' response if under these facts the Alabama Supreme Court had determined that the warranty contract containing the arbitration provision involved interstate commerce. Ms. Lopez would say what Petitioners said: the contemplation test is usable "to *broaden* the reach of the FAA and rebut arguments that it does not apply." Ms. Lopez would argue that the test was too broad, too burdensome. Of course, Ms. Lopez' real complaint would be with the factual application of that test, just like the Petitioners.

Under the facts of this case, there was no interstate commerce involved in the warranty contract that contained the arbitration clause. Even if this Court thought the contemplation test deserved review, the virtually non-existent factual basis for a finding of interstate commerce would likely limit the precedential value of the case and virtually require affirmance. Certiorari review is unnecessary, and the certiorari petition is due to be denied.

II.

CERTIORARI REVIEW IS UNNECESSARY, BECAUSE ALABAMA SUPREME COURT DECISIONS ON THE FEDERAL ARBITRATION ACT DO NOT CONFLICT WITH DECISIONS BY THIS COURT.

A. Petitioners' Argument About The State Of The Law Involving The Contemplation Test In Alabama Is Inaccurate.

Section II of the FAA declares that written agreements to arbitrate:

> In any maritime transaction or a contract evidencing a transaction *involving commerce* . . . shall be valid . . . .

(Emphasis added).

Obviously, arbitration clauses in contracts "involving commerce" are enforceable. "Commerce" is broadly defined in relation to the FAA at 9 U.S.C., § 1, and, as Ms. Lopez shows in Section III of this brief, there has been litigation concerning the meaning of "commerce" in relation to the FAA. The Alabama Supreme Court analyzes the applicability of the FAA by determining whether "commerce" is *involved* in the contract containing the arbitration clause. *Lopez v. Home Buyers Warranty Corporation, et al.*, 628 So. 2d 361 (Ala. 1993); *The Terminix Int. Co. LP v. Jackson*, 628 So. 2d 357 (Ala. 1993); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 628 So. 2d 354 (Ala. 1993). To determine whether "commerce" is *involved* in a contract containing an arbitration clause, Alabama courts determine whether the parties contemplated that the contract involved substantial interstate activity at the time the parties entered into the contract and accepted the arbitration clause. *Lopez v. Home Buyers Warranty Corporation, et al.*, 628 So. 2d 361 (Ala. 1993); *The Terminix Int. Co. LP v. Jackson*, 628 So. 2d 357 (Ala. 1993). In other words, the test Petitioners challenge does not define "commerce", but, instead, analyzes whether "commerce" is *involved* in a contract containing an arbitration clause.

Petitioners argue that the analysis of whether the parties contemplated substantial interstate activity is completely subjective. That is inaccurate. The actual standard, both as stated and as applied, looks at both objective and subjective criteria. For example, in *The Terminix Int. Co. LP v. Jackson*, 628 So. 2d 357 (Ala. 1993) the Alabama Supreme Court considered some subjective criteria, but also wrote that the performance of the contract:

> did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the contract.

628 So. 2d at 359. Consideration of "reasonable persons" is obviously objective criteria. Even clearer, the Alabama Supreme Court in *Allied-Bruce Terminix Companies v. Dobson*, 628 So. 2d 354 (Ala. 1993) explicitly stated the criteria for evaluating whether the parties contemplated substantial interstate activity as containing both subjective and objective criteria:

> Cogent evidence regarding their state of mind at the time would be *the terms of the contract, and if it, on its face, evidences interstate traffic . . . the contract should come within Section II [of the FAA]*. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated.

(Emphasis added). 628 So. 2d at 355. Accordingly, this is not a purely subjective analysis, but rather an analysis focusing on both objective and subjective factors.

Petitioners also claim that Alabama courts do not recognize that the FAA preempts Alabama's policy against predispute arbitration clauses. That claim does not withstand scrutiny. *In every case* involving the FAA, the Alabama Supreme Court recognizes that the FAA preempts state law. For example, in *The Terminix Int. Co. LP v. Jackson* the Alabama Supreme Court stated:

> If an arbitration clause is contained in the contract that involves Interstate Commerce, then the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq.*, preempts state law. Under the FAA, arbitration clauses are specifically enforceable.

628 So. 2d at 359.

Moreover, Petitioners' argument that the Alabama Supreme Court favors Alabama policies over the FAA is circular to the issue of whether the standard challenged in the certiorari petition is appropriate for determining if the FAA applies. That argument by Petitioners is purely emotional, not logical. If the standard for determining the applicability of the FAA is appropriate, then Alabama law is appropriately preempted, considering that in every single case involving the FAA the Alabama Supreme Court has recognized that the FAA preempts Alabama law. Nevertheless, Petitioners imply that the Alabama Supreme Court is somehow circumventing the Supremacy Clause by not allowing federal law to preempt state law. That is untrue, but if unaddressed, Petitioners' tactic could cause confusion when considering the decisions of this Court and some decisions of United States courts of appeal.

B. The Holdings By The Alabama Supreme Court Do Not Conflict With Decisions Of This Court.

Petitioners claim that Alabama Supreme Court holdings conflict with *Southland Corporation v. Keating*, 465 U.S. 1 (1984) and *Perry v. Thomas*, 482 U.S. 483 (1987). Neither *Southland Corporation v. Keating* nor *Perry v. Thomas* addressed the issue raised by Petitioners — whether the contemplation test used by the Alabama Supreme Court is improper.

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court addressed a California statutory ban on arbitration of claims brought in state court under a state franchise law. This Court held that Section 2 of the FAA is applicable in both state and federal courts and that the California statute was preempted. Petitioners here challenge the contemplation standard for determining whether commerce is "involved" in a contract containing an arbitration clause, not a specific state statute that outlaws

arbitration in certain cases no matter what.[2]

Petitioners cite *Southland Corporation v. Keating* for the general proposition that Congress with the FAA declared a national policy favoring arbitration of claims that the contracting parties agreed to resolve by arbitration. *See* 465 U.S. at 14. Even assuming Petitioners are correct, any existence of a national policy favoring arbitration does not create a conflict between Alabama and this Court's cases unless one shows that the Alabama courts favor Alabama policies over the FAA. As stated immediately above, Petitioners' arguments concerning favoritism are circular to the issue of whether the contemplation standard is proper, because if the contemplation standard is proper, Alabama courts properly preempt Alabama law.

Perry v. Thomas, 482 U.S. 483 (1987) is distinguishable. In *Perry*, the issue was what matters were and what matters were not subject to the FAA and arbitration. The case involved a stockbroker's dispute with a national stock brokerage firm that employed him over commissions paid in connection with the sale of certain stocks. This Court addressed whether Section 2 of the FAA preempted Section 29 of the California Labor Code, which provided that actions for collection of wages were not subject to private arbitration agreements. Again, as in *Southland*, what was challenged was a specific state statute outlawing arbitration in certain cases no matter what. This Court determined that the FAA applied to the case and held accordingly that the FAA preempted the state law.

Petitioners cite *Perry v. Thomas* for the phrase stating that the FAA is a statute "that embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the

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2. There is no argument that Alabama's statute opposing predispute arbitration is illegal and is due to be vacated.

commerce clause." 482 U.S. at 490. Petitioners use that language to argue that the contracts at issue here must somehow involve commerce within the meaning of the FAA. In *Perry*, the issue was what matters were and what matters were not subject to the FAA. Read in context, the Petitioners' quoted phrase refers to Congress' exercising its power to resolve what issues are arbitrable. *Perry* did not say that Congress had in fact decided to subject every contract to the FAA. It stated that if a contract is, in fact, governed by the FAA, then inconsistent state law is preempted. It determined that the transactions addressed by the challenged statute were indeed within the FAA.

Perry did not speak to the issue presented here, which is whether there is evidence that would allow a court to decide that the warranty contract *involves* "commerce," so that the FAA is invoked. There is no legal dispute properly raised by Petitioners concerning the definition of "commerce." As explained earlier, the test Petitioners challenge does not define "commerce" but, instead, analyzes whether "commerce" is *involved* in a contract and arbitration clause. That "commerce" was not *involved* was factually determined by the Alabama Supreme Court, and that factual determination need not be reviewed.[3]

Petitioners attempt to create a gloss implying that the contemplation test somehow diminishes any policy favoring arbitration mentioned by this Court in *Southland Corporation* or *Perry v. Thomas*. Petitioners themselves stated that the *contemplation test itself* was created "not for the purpose of restricting the reach of the FAA," and that it is usable "to *broaden* the reach of the FAA and rebut arguments that it does not apply." As always, it is not the contemplation test itself that the

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3. Of course, in *Perry v. Thomas* there was almost no doubt that the action involved "commerce." The dispute in *Perry* involved a stock broker on a national stock brokerage exchange and sales of stocks on national stock exchanges.

Petitioners actually object to; instead, as Ms. Lopez has consistently shown, Petitioners object to the application of the facts to that test. That objection does not deserve certiorari review. The petition for a writ of certiorari is due to be denied.

III.

CERTIORARI REVIEW IS UNNECESSARY, BECAUSE ALABAMA SUPREME COURT DECISIONS ON THE FEDERAL ARBITRATION ACT DO NOT CONFLICT WITH THE DECISIONS OF ANY FEDERAL COURTS OF APPEAL.

The United States courts of appeal's cases cited by Petitioners show controversies over whether "commerce," existed. Because the contemplation standard does not define "commerce," the cases cited by Petitioners are distinguishable.[4] Even assuming that the test did define "commerce," any differences in holdings results from the factual analysis by the courts, not because of the contemplation test. Compared to the interstate commerce in Petitioners' cited cases, in this case the only evidence indicating that the warranty contract involved interstate commerce was that it provided that any claims under the warranty should be filed in Denver, Colorado or Tucker, Georgia.[5]

To avoid inundating the Court with a morass of factual details, Ms. Lopez will only briefly address each case. *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1985)[6]

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4. This is explained in detail in Section II.A.

5. The other facts the Petitioners assert as relating to commerce address the contract for the purchase of the house, which did not contain the arbitration provision.

6. In their Alabama Supreme Court brief, Petitioners characterized the (Cont'd)

involved a contract dispute between Illinois residents who formed a partnership concerning property and business activities in Texas. In *Del E. Webb Construction v. Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987) the court factually determined that in this dispute over a construction contract:

> The contract involved persons from different states; employees of the plaintiff traveled interstate; the interstate mails were used to facilitate the work of the plaintiff's subcontractors; and the materials used in the construction on the defendant's facilities were manufactured and moved in interstate commerce.

823 F.2d at 147.

Foster v. Turley, 808 F.2d 38 (10th Cir. 1986) involved a contract dispute over an agreement to purchase half of a New Mexico mine where the output of the mine went into interstate commerce. The buyer was in Oregon; he sent trucks to New Mexico; proceeds were sent to him in Oregon; and the mine products were sometimes milled and sold outside New Mexico.

Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 243-244 (5th Cir. 1986), an opinion roundly criticized by other courts, concerned a contract dispute involving a general partnership that had partners in both Louisiana and Texas. The Texas partners worked and traveled in Louisiana, as well as communicating with Louisiana frequently; personnel were sent from Texas to Louisiana; and when in Texas the Texas partners received all partnership payments there. 797 F.2d at 243.

(Cont'd)
holding in *Snyder v. Smith* as "law of the case," which indicates Petitioners then viewed the holding of that case as limited to the facts of that case.

There is no conflict between Alabama Supreme Court decisions and the decisions of the United States courts of appeal. Any perceived conflict comes from factual distinctions between the cases cited by Petitioners that address what constitutes "commerce" — which the challenged contemplation test does not address — and this case, where factually the Alabama Supreme Court held that "commerce" was not *involved* in the contract containing the arbitration provision. Certiorari review is unnecessary. The petition is due to be denied.

IV.

THE FEDERAL ARBITRATION ACT WILL NOT BE DESTROYED IF CERTIORARI REVIEW IS DENIED.

With unsupportable assuredness, at pages 16-21, Petitioners predict the complete destruction of the FAA if certiorari is denied and the contemplation test allowed to stand. That argument will not withstand scrutiny.

At pages 17-19, Petitioners claim that certain entire groups of contracts are exempt from the FAA under current Alabama law. For example, at page 17, Petitioners claim that because of this case the FAA and all FAA related decisions "no longer apply in Alabama to all home buyers warranties issued by out of state companies with no local presence."

Petitioners also claim (incorrectly) that the contemplation test, the alleged root of the destruction of the FAA, requires a *purely subjective analysis* of the contemplation of the parties to determine the applicability of the FAA. If that is so, then no entire group of contracts can be judicially removed from the reach of the FAA, because the understanding of the parties to the contract about the interstate activity involved in the contract determines the applicability of the FAA. Cynicism reaches new heights indeed if

Petitioners are actually suggesting that everyone signing contracts containing arbitration provisions would perjure themselves if the issue of subjectively contemplating the arbitration provision was litigated.

In relation to the contemplation test, the only way for there to be a purely uniform result as to an entire group of contracts is if a uniform contract is viewed purely in *objective* terms. That is, if a standard contract was said to be on its four corners outside the FAA and there were no subjective criteria, an entire group of contracts could be held to be outside the FAA. Petitioners strenuously argue that the entire analysis is purely subjective, however. Ms. Lopez has shown that under the purely subjective standard that Petitioners claim exists, there can be no entire group of contracts judicially removed from the FAA.

In reality, the contemplation analysis in the Alabama decisions contains both objective and subjective elements, as shown in Section II.A. With such an analysis, the test effectively prevents widespread destruction of the FAA as to entire groups of contracts. In this regard at the very least, Petitioners should concede that the test is proper.

Considering the logical fallacies of Petitioners' arguments, Ms. Lopez will neither bother the Court with tedious factual discussion of the Alabama cases mentioned, nor will she consume the Court's time replying to the rhetoric based on those fallacies.

CONCLUSION

The apocalyptic tone used throughout by Petitioners is inappropriate. There is nothing unusual or spectacular about this case. The Alabama Supreme Court made a factual determination that the warranty contract containing the arbitration provision did not *involve* interstate "commerce." That judgment and the standard applied in reaching that judgment does not conflict with the decisions of this Court or the United States courts of appeal. Certiorari review is unnecessary.

The petition for a writ of certiorari to the Alabama Supreme Court is due to be denied. The cause is due to be remanded to the Alabama Supreme Court then the Circuit Court of Montgomery County, Alabama, so that Ms. Lopez can proceed to trial.

Respectfully submitted,

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